Supreme Court, U.S.
FILED
DEC 3 1992
OFFICE OF THE CLERK

NO. 92-351

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

LEONARD E. HELLER, SECRETARY,
KENTUCKY CABINET FOR HUMAN RESOURCES,

Petitioner,

V.

SAMUEL DOE, BY HIS MOTHER AND NEXT
FRIEND, MARY DOE, ET AL.

Respondents.

On Writ of Certiorari To The
United States Court of Appeals
For The Sixth Circuit

BRIEF OF VOICE OF THE RETARDED (VOR), ET AL. AS AMICI CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF VOICE OF THE RETARDED (VOR), ET AL. AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI

Voice of the Retarded (VOR) was organized in 1983 in Illinois by a group of parents whose children resided in larger facilities for developmental disabled persons. It was incorporated as a Not-For-Profit Corporation in 1984. The organization has grown to include parents, family members, providers, professionals, friends, and affiliated groups in forty-seven states. The members have involvements or relationships with

persons residing in larger MR (Mental Retardation) or DD (Developmental Disabilities) facilities, community living arrangements, and at home. VOR supports a continuum or range of services for people with developmental disabilities; but most importantly, the group is opposed to the nation-wide movement (by some advocacy groups and professionals) to close all larger and medium-sized developmental centers. VOR promotes freedom of choice and a range of residential programs to meet the special needs of many special citizens. VOR supports the existence of residential choices.

VOR and many of its affiliated groups submit this brief as *amici curiae* in support of the petitioner Leonard E. Heller, Secretary, Cabinet for Human Resources, State of Kentucky in *Samuel Doe, et al. v. Leonard E. Heller*, United States Supreme Court, No. 92-351. VOR and the other amici groups urge this Court to reverse the ruling of the United States Court of Appeals for the Sixth Circuit in *Doe v. Cowherd*, 965 F.2d 109 (6th Cir. 1992) and *Doe v. Austin*, 848 F.2d 1386 (6th Cir. 1988), *cert. denied*, 488 U.S. 967 (1988). This brief is being filed by counsel for VOR. Consent to join this brief has been provided by the organizations listed in the Appendix. A purpose of VOR, as provided in its constitution, is

> to unite organizations and concerned individuals in promoting the general welfare of persons with mental retardation wherever they may be and particularly those who are presently in residential placement or in need of this service . . . .

The issues presented by this case are

(1) whether Kentucky may in its commitment procedures establish "the clear and convincing" standard of proof for involuntary commitments of mentally retarded adults, which is different from the "beyond a reasonable doubt" burden of

proof required for commitment of mentally ill adults in Kentucky (1992 decision, Court of Appeals);

(2) whether Kentucky may by statute enable third parties (in particular, family members and guardians), to participate in commitment proceedings for mentally retarded adults, without violating equal protection and due process (1992 decision, Court of Appeals);

(3) whether there is a rational basis for distinguishing between mentally ill and mentally retarded persons for determination of civil commitments (1988 decision, Court of Appeals);

(4) whether Kentucky commitment statutes for mentally retarded adults must conform to the commitment procedures for mentally ill persons (1988 decision, Court of Appeals);

(5) whether mentally retarded adults must be committed to treatment centers in Kentucky through a judicial hearing, under due process or equal protection standards (1988 decision, Court of Appeals); and

(6) whether it is a violation of due process for parents and guardians of persons to be committed to serve as members of interdisciplinary teams (1988 decision, Court of Appeals).

These issues are of vital importance in all fifty states. Although at least one state, New Hampshire, no longer maintains its congregate care facility for developmental disabled persons, most states still have one or more larger facilities, along with community living arrangements. Furthermore, there are many variations in the guardianship laws in the fifty states, and there are differences in the procedures for assigning disabled people in public or private facilities, large and small. VOR submits that in most states, residential placements of mentally retarded persons outside of their homes are treated essentially as voluntary, whether the facilities be large, medium, or small. It is not known whether disabled persons are anywhere committed to community living arrangements (CLAs). It should be seen that the Supreme Court's ruling in

the present case may have profound effects upon state service systems for disabled people.

As a primary organization which represents parents and family members of developmental center residents, VOR has a close and direct interest in the outcome of this case. It is joined in this brief by the organizations listed in the Appendix.

The organizations shown have consented to join in the VOR *amici curiae* brief, and they claim the same interest in this case as does VOR. They are parent and guardian groups of specific developmental centers and training schools, and in some instances, they are state-wide parent/guardian associations.

SUMMARY OF ARGUMENT

(1) The Kentucky Statutes treating the commitment of a mentally retarded person differently from mentally ill persons do not violate due process or equal protection. The Sixth Circuit Court and the District Court (W.D. Ky) erred in holding that commitment statutes for mentally retarded persons must conform to the procedures and rights afforded to the mentally ill. There are many differences between persons who suffer from mental illness and mental retardation, in addition to the one distinction recognized by the Sixth Circuit Court, that mentally ill persons treated with medications may recover within short periods of time.

Developmental disabilities occur in a myriad of forms, and the residential facilities and support systems must be adapted to meet the varied needs of DD persons. Developmental centers for disabled people are substantially different from mental hospitals. No attention was given in the opinions below to the nature of developmental centers and the specialized care given in different centers. They are primarily places of

residence and care, providing structured support for residents based on need; they are not places of isolation and segregation.

Commitment to a mental retardation center is not like commitment to a mental hospital. Mental retardation centers are places of residence, as are smaller residential facilities for developmentally disabled persons.

(2) Larger developmental centers — sometimes called institutions — provide support services for severely impaired people which cannot be found in other settings. The lower court rulings in this case do not adequately address the nature of these facilities and services and do not make an accurate distinction with mental health facilities. Citations from recent journals are provided in the brief to show the confusion over the word "institutions." Some professionals are now saying that community systems created during the past twenty years are becoming institutionalized like the larger facilities. If formal commitments are required to place retarded persons in the larger facilities, it makes no sense to exempt other residential facilities from the same procedures.

(3) The decisions of the lower courts in this case reflect the old bias against larger institutions. Disabled persons normally reside in residential centers for a long term. They are assigned to the centers for "habilitation" and "training." They are treated for physical ailments, but they are provided opportunities to improve their basic skills through "habilitation." The lower courts erred in not recognizing this difference.

(4) Due process and equal protection should not require commitment hearings for mentally retarded persons before a judicial officer. *Secretary of Public Welfare of Pa. v. Institutional Juveniles*, 442 U.S. 640 (1979); *Parham v. J. R.*, 442 U.S. 584 (1979). There is a rational basis for distinguishing between the mentally ill and the mentally retarded with regard to their civil commitments. There was no real exploration of this question shown in the record of this case. There was no analysis

of the significant differences in the types of facilities which exist to support developmentally disabled persons, a significant failure of the lower Courts.

(5) The standard of proof required for mental retardation commitments under Kentucky law is the standard found "constitutionally adequate" in *Addington v. Texas*, 441 U.S. 418, 433 (1979). Respondents relied upon *Clark v. Cohen*, 613 F. Supp. 684 (E.D. Pa. 1985), a case which directed Pennsylvania to transfer a person with mild retardation from a mental health center to a community living arrangement. The court noted that the standard of proof for commitments in Pennsylvania was "clear, unequivocal, and convincing" evidence. The burden of proof required for criminal convictions, guilt "beyond a reasonable doubt," is too high for civil commitments. There is no basis to hold the Kentucky burden of proof standard unconstitutional under either due process or equal protection.

(6) The Supreme Court should review both the 1988 and 1992 decisions of the Sixth Circuit Court of Appeals. By denying writ of certiorari, the court has not approved the 1988 decision. The 1988 decision of the Court of Appeals is not conclusive. The Sixth Circuit Court remanded the case for further action. The Supreme Court has power to correct all errors of law in this case.

(7) The Supreme Court should reverse the decision of the Sixth Circuit in 1992 which declared that Kentucky could not by statute enable third parties to participate as parties in commitment proceedings for mentally retarded adults. This provision in the Kentucky statutes was added as part of HB 511 in 1990. *Ky. Rev. Stat.* §202B.160(3). There is no rational basis to deny third parties, particularly parents, family members and guardians, the right to participate in commitment hearings. Parents and guardians are in a better position than many experts to present countervailing arguments (and facts) to contentions that persons should not be assigned to larger developmental centers. The Supreme Court has recognized the rights of parents and guardians to represent their minor children in hearings for commitments to mental hospitals. *Parham v. J. R.* 442 U.S. 584 (1979). There is no sound reason to deny parents and guardians the role as parties in proceedings for their mentally retarded adult children and wards, whether or not the statute permits appointment of independent counsel for the person to be committed.

ARGUMENT

I. THE KENTUCKY STATUTE WHICH AUTHORIZES COMMITMENT OF MENTALLY RETARDED PERSONS UPON THE CLEAR AND CONVINCING STANDARD OF PROOF DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

A. Case History and Commentary.

In addressing this first issue, the Supreme Court should first consider the early stages of this case. On November 20, 1986, the United States District Court held that the Kentucky statutes treating commitment of mentally retarded persons differently from mentally ill persons violated the Equal Protection Clause. See *Ky. Rev. Stat.* §202B.050 (1986); *Doe v. Austin*, 668 F. Supp. 597, 600-601 (1986). Following the predilection that mentally ill and mentally retarded persons must be treated alike in their commitment proceedings, the District Court stated that it would violate due process "for Kentucky to involuntarily commit a mentally retarded person who is eighteen years of age or over without first awarding him a judicial hearing." *Id.*, 668 F. Supp. at 600. The District Court held further that labeling a commitment as "voluntary" does not change the character of the commitment of a mentally retarded person by his guardian or relative when the mentally

retarded person is committed without his or her consent. *Id.*, 668 F. Supp. at 600. The statute which treated the application by parents or guardians for placement of their retarded family members or wards in any mental retardation center as voluntary, was declared to violate due process. *Ky. Rev. Stat.* §202B.040(5); *Id.*; *Doe*, 668 F. Supp. at 600. The Court did not reach the question what review procedures would be required for MR commitments, noting the differences between mentally ill persons and those with mental retardation. Mentally ill persons may recover within short periods of time; whereas, "severely and profoundly mentally retarded persons very rarely experience such dramatic improvements in their condition." *Id.*, 668 F. Supp. at 601. The court recognized this clear difference between these two major groups of disabled persons: damaged brains do not repair with medications.

The District Court in its 1986 decision distinguished the Supreme Court decision in *Parham v. J. R.*, 442 U.S. 584 (1979), in which the Supreme Court declared that the Georgia procedures for admission of a minor child to a Georgia mental health facility did not violate due process. The Court in *Parham* held that due process did require some kind of inquiry be made by a neutral fact-finder to determine whether a state's statutory requirements for admission of a child were satisfied, but the inquiry could be conducted by a staff physician as fact-finder. *Id.*, 442 U.S. at 608. In a related case, the same ruling was made for mentally ill and mentally retarded minor children in Pennsylvania, the Court finding that Pennsylvania procedures complied with due process. *Secretary of Public Welfare of Pa. v. Institutionalized Juveniles*, 442 U.S. 640 (1979).

The District Court in *Doe* recognized the rights and obligations of parents in acting for their minor children, under *Parham v. J.R.* However, the District Court followed the reasoning of the District Court in *Clark v. Cohen*, 613 F. Supp. 684 (E.D. Pa. 1985), which concluded that rights of minors in commitment cases are more restricted than the rights of adults.

The District Court cited *Clark, supra*, 613 F. Supp. at 697-98, 699-700, that "once someone becomes an adult, one's parents lose that degree of authority found so crucial in *Parham*." *Doe, supra*, 668 F. Supp. at 600.

On appeal, the Sixth Circuit Court overruled the District Court's decision that "because *Parham* is not controlling, due process requires that adults who are involuntarily committed are entitled to a judicial hearing." *Doe v. Austin*, 848 F.2d 1386, 1393 (1988), *cert. denied*, 488 U.S. 967 (1988). "Due process does not require that the neutral trier of fact be legally trained or a judicial or administrative officer." *Id.*, 848 F.2d at 1393; *Parham*, 442 U.S. at 607. The Sixth Circuit Court was guided in its reversal of the District Court on this point by *Vitek v. Jones*, 445 U.S. 480 (1980). In *Vitek*, the Supreme Court defined the due process requirements for transferring a state prisoner to a state mental hospital. The Nebraska statute, which permitted such a transfer based upon findings by a physician or psychiatrist that a prisoner suffered from mental disease or defect, was held defective mainly because there was no right to notice and hearing. The Sixth Circuit Court found that, at a minimum, the procedural safeguards approved by the Supreme Court in *Vitek* were required for commitment of mentally retarded adults. *Doe v. Austin*, 848 F.2d at 1393-94.

The Sixth Circuit Court upheld the lower court's decision that the Kentucky procedures for involuntary commitment of adults violated due process, lacking the following requirements:

(1) a procedure for the admittee to present witnesses or documentary evidence;
(2) a clear opportunity for cross-examination; and
(3) opportunity for independent assistance, under statute.

Doe v. Austin, 848 F.2d at 1394. The Court found that the presence of a parent or guardian of the admittee on the interdisciplinary team, as authorized by *Ky. Rev. Stat.* §202B. 010(1) (1986), posed a serious threat to impartiality. This last obser-

vation by the Court of Appeals indicates a failure in the Court to recognize the absolute pervasion of partiality existing today on all sides of the controversy over assignments of disabled persons to residential facilities.

The partiality (which is certainly not all bad) between proponents on all sides may be seen in the odyssey of Tracy Horton and her family in Kentucky (with 15 or so separate hearings and trials concerning her residential placement). It was an obsession with procedural due process at the expense of common sense, substantive justice, and true impartiality which produced that travesty of justice. There was also an apparent confusion among advocates, professionals, and, yes, the courts in the Horton case. Where was impartiality shown by the attorney assigned to represent Tracy Horton through most of those proceedings? The parents seemed to have the only clear vision for Tracy's welfare during her minority and in the judicial proceedings. Only the father, Thomas Horton, was heard — through his deposition — but his testimony carried the marks of conviction and sincerity. See Thomas Horton deposition, entered in the record of this at R. 213 (hereinafter *"Horton dep."*).

The Court of Appeals then declared the Kentucky statutes and procedures for involuntary commitment of mentally retarded persons in violation of the Equal Protection Clause. Reasons given were that the procedures for such commitments did not conform to mental illness commitments and

> the Commonwealth has not demonstrated that it has any rational basis for distinguishing between the mentally ill and the mentally retarded with regard to a judicial determination of their eligibility for civil commitment.

Doe v. Austin, 848 F.2d at 1394.

It was the existence of a provision in the Kentucky statutes which the Sixth Circuit Court identified as the basis for requiring judicial hearings for admissions of mentally retarded adults to Kentucky's Mental Retardation Treatment Centers ("MRRTCs"). *Ky. Rev. Stat.* 202B.050 (1986); *Doe v. Austin*, 848 F.2d at 1394-1395. The Sixth Circuit Court found that there was no requirement for judicial hearing under the Due Process Clause. *Id.*, 848 F.2d at 1393. However, the Circuit Court held that the Commonwealth had not demonstrated that it had "any rational basis for distinguishing between the mentally ill and the mentally retarded with regard to a judicial determination of their eligibility for civil commitment." 848 F.2d at 1394. The Court in support of this decision cited *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985); *Kremens v. Bartley*, 431 U.S. 119, 135-36 (1977); *Bastromb v. Herold*, 383 U.S. 107, 111 (1966). In the *Kremens* case, the Supreme Court stated in additional litigation, the District Court should pay careful attention to the difference between mentally ill and mentally retarded. *Kremens*, 431 U.S. at 135-136.

It was the finding that there was no rational basis for distinguishing between the mentally ill and the mentally retarded which formed the basis for the *Doe* decision in 1988 that all commitments of mentally retarded adults by their parents or guardians were involuntary. However, the record reveals no real exploration of this question by the parties or by the court. *Amici*, which represent thousands of parents, family members, and guardians throughout the country, have no difficulty in making distinctions between these two groups for establishing different classifications and procedures for residential placements.

The Court of Appeals cited *Cleburne, supra*, at 439 for the proposition that equal protection requires "that all persons similarly situated should be treated alike." *Doe, supra*, at 1394. The Court acknowledged that there were differences between

the mentally ill and the mentally retarded; but, except for seeing that mentally ill persons may recover within short periods, identified no significant differences. *Doe, supra*, at 1394-95. Most importantly, the Court provided no analysis and no discussion of the significant differences in the types of facilities which exist in Kentucky and other states to support developmental disabled and mentally ill persons. This was a significant failure of the lower courts, which will be discussed further below.

In the *Cleburne* case, the Court applied the "rational basis" test to a discriminatory local ordinance, used to deny a special use permit for a group home for mentally retarded persons (13 men). The Court followed precedent in stating the general rule "that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne v. Cleburne Living Center, Inc.*, et al., 473 U.S. at 441; *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). The Court stated further that "when social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude." *Cleburne, supra*, at 441. The majority in *Cleburne* stated that where

> individuals in a group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be.

Id., at 442. The lower courts in the present case have not given the State of Kentucky that latitude prescribed in *Cleburne* for enacting "social" legislation (establishing policies, programs,

services, and procedures) for mentally retarded persons. The actual problems of caring for severely afflicted persons in our society are far greater than any vexations which may exist over due process or equal protection.

The Sixth Circuit Court remanded the case to the lower court to consider the requirements for judicial hearings. During this implementation phase and before final decision by the District Court, the Kentucky General Assembly in 1990 enacted House Bill 511, which amended the Kentucky statute for voluntary and involuntary admissions to ICF/MR facilities. See *Ky. Rev. Stat.* 202(B). In addition to making comprehensive changes in the commitment procedures, the Kentucky Legislature in HB 511 eliminated a provision in the statute which gave mentally retarded persons the same rights as mentally ill persons are given in *Ky. Rev. Stat.* 202A. At the time, the parties were negotiating a proposed "Agreed Final Compliance Plan." *Doe v. Cowherd*, 770 F. Supp. 354, 356 (W.D. Ky 1992).

Plaintiffs, *Doe* and the certified class, then contended that HB 511 denied the plaintiffs procedural protections. After considering Plaintiffs' motion for summary judgment and preliminary injunction (there has never been a trial in this extended case), the District Court ruled on several points, only two of which are basic points in the present case on certiorari: the required standard of proof for commitment of mentally retarded commitments and the statutory role of third parties in the MR commitment process. *Doe v. Cowherd, supra*, 770 F. Supp. at 358-59. On appeal, the Sixth Circuit Court upheld the District Court's ruling on the above two points, the Court again relying on its predilection to afford mentally retarded adults all of the procedural rights of mentally ill patients in commitment proceedings.

The Court of Appeals, as it did in *Doe v. Austin*, held that the State of Kentucky had not proven its assertions that there are great differences between mentally retarded persons and

the mentally ill relevant to due process rights, that mentally retarded persons are "habilitated" rather than "treated," that facilities for the two groups are different (MR centers being less intrusive), and that there is more stigmatization with MI hospitals. VOR vigorously disagrees with this court decision, that the Commonwealth had failed to prove that the distinctions "have some relevance to the purpose for which the classification is made." *Id.*, at 1394; See *Bastromb v. Herold*, 383 U.S. 107, 112 (1966). The grounds for VOR objections to these findings are discussed below.

B. <u>There was a "rational basis" for the distinctions made between mental retardation commitments and commitments for the mentally ill in the Kentucky statutes declared unconstitutional by the lower courts.</u>

The last developmental disabilities statute which was enacted provides that there were over three million persons in this country who suffer from some form of developmental disability. *The Developmental Disabilities Assistance and Bill of Rights Act*, §101(a)(1), 42 U.S.C.S. 6000(a)(1) (Cum. Supp. 1992). The great majority of these people clearly have mild disabilities. One study showed the following breakdown:

Mild disabilities	–	90%
Moderate disabilities	–	6%
Severe disabilities	–	3.5%
Profound disabilities	–	1.5%

Lakin, *DeInstitutionalization of Mentally Retarded*, 314 Med. Sci. Law (1991) Vol. 31, No. 4. Clearly, most developmental disabled people suffer from mild or moderate disabilities. Most of these groups should not require the services of larger residential facilities, full-time.

Developmental disabilities occur in a myriad of forms. The kinds and severities of disabilities vary broadly. There are many people with afflictions like those of Tracy Horton. *Horton dep.* (R. 213, pp. 9-10, 11-12). There are those who have many of Tracy Horton's disabilities, but also have additional disabilities such as blindness. Some have her disabilities but do not have developed spines, or other critical body parts, making it impossible for them to even sit without supports. There are those with her mental disabilities who are hyperactive. It is possible for some parents, depending upon their personal circumstances, to care for severely disabled children for many years. But there is a broad class of disabled persons residing outside their homes (in community living arrangements and in larger facilities) whose families supported them at home until there were no family members able to do so.

A range of responses by service systems is required at certain times in the lives of disabled persons. State programs for handicapped persons, including medical treatment, training and other support services, should exist in ways to respond to the varied conditions of our disabled people. Larger congregate facilities, which serve those with the most severe handicapping conditions, are called developmental centers, state schools, or, as in Kentucky, MR (or DD) treatment centers. Whatever they are called, they serve the same function, to provide efficient, structured support for persons who cannot care for themselves and whose families are unable to do so.

It is customary for many parents to keep their severely disabled children at home during their early years, when they are small and easier to manage. In addition, there are more local support programs for the young, particularly educational programs. Mr. Thomas Horton described some of these programs, day care centers and a camp available to his daughter at an early age. There was a school which provided physical

and occupational therapy, a dietary program, and training programs. The school ended when Tracy Horton reached twenty-one. *Horton dep.* (R. 213, pp. 13-14, 15-16).

Like many people who live in developmental centers, Tracy had almost no capacity for supporting herself. Her parents and family members did it all. When Tracy reached adulthood, she was far better served in the state treatment center. In addition to her direct care requirements, Tracy Horton had multiple medical needs, like many of those today who reside in the larger centers. Providing medical care for persons in these centers is far more efficient and effective than would be true in small community settings. *Horton dep.* (R. 213, pp. 18-19, 22-23).

It should not require much expert testimony to show the differences between persons suffering from mental illness, whose illnesses can in most cases be controlled by medication and therapy, and those suffering from mental retardation. In recognition of the substantial differences and support requirements, many states have created separate divisions of mental health and mental retardation services. In the early 1970's, mental retardation became part of a broader group designated by the federal government as "developmental disabilities," which included in addition to mental retardation, autism, cerebral palsy, and epilepsy. See *The Developmental Disabilities Assistance and Bill of Rights Act*, §102(5), 42 U.S.C. §6001(5) (Cum. Supp. 1992). It is generally understood that persons suffering from one or more of the four disabilities qualify under the DD definition, under three or more of the seven life activity areas. *Id.*, §6001(5)(D). This was an unfortunate grouping, as there are many differences (and varying degrees of involvement) within the group with developmental disabilities. The needs of those who can not function because of mental retardation are much different from those whose real handicaps are physical.

By failing to recognize the great differences which exist between mental illness and mental retardation and between those subgroups of people within each category and by failing to address the sharply different support requirements for each group and subgroup, the Sixth Circuit Court of Appeals and the United States District Court have fallen into a dark hole. The rulings of the lower courts demonstrate a misunderstanding of developmental disabled people and their needs. The rulings reflect an antiinstitution sentiment without expressing it. Otherwise, why should the Courts not even mention the various CLAs as places of commitment? CLAs for some people can be and are more restrictive than larger facilities. See *Pennhurst v. Halderman*, 612 F.2d 84, 107 (6th Cir. 1979), which found that institutionalization might be the least restrictive environment, the least restrictive available means of habilitation for some people. Downsizing and closure of larger residential facilities has been promoted by various groups who in general represent persons with substantially different kinds of disabilities than those residing in the larger facilities. VOR disagrees with the contention made by some groups that all people with disabilities can and should live and receive services in "community" settings.

It is generally recognized that for the past twenty or so years, our nation has undergone an intensive examination of the larger institutions. The words "institutions" and "community placements" are found throughout the cases in this field, particularly where institutional placements have been challenged. See. *e.g., Lelsz v. Kavanaugh*, 210 F.2d 1040 (5th Cir. 1983) and 807 F.2d 1243 (5th Cir. 1987). The challenges to the very existence of larger facilities have been massive. It is in this light that the Kentucky statutes, as they have existed and have been amended during the past ten years, should be reviewed. The specter of a public defender assigned to represent Tracy Horton contesting the assignment of that child to the Hazelwood facility is a good example of the adversarial mood

of our time. To some, institutions are to be avoided at all costs. The lower court decisions should be seen in that light.

The decisions of the District Court and the Sixth Circuit Court in this case reflect that obsession of some groups, and perhaps some professionals, against institutional care systems. VOR members and supporters (thousands of them) hold no aversion to our larger institutional facilities for mentally retarded persons. The word "institution" does not hold fear for parents whose children need the structured support of a larger facility. VOR contends that the national passion for closing institutions is passing, as it should.

Many professionals are realizing what parents have contended all along, that for many severely afflicted people larger residential facilities offer more opportunities for freedom and integration into the community than small homes; that larger centers offer centralized support, efficient organization, and space; and community living arrangements offer decentralized support and restricted space for some severely afflicted people. Providing the same level of care in community living arrangements as exists now at many larger residential facilities would be more costly if the same services were provided, because decentralized community living arrangements are less efficient. States save money only by cutting services; the service and support systems decline; and the disabled populations suffer for it.

Traditionally, persons with serious mental capacities — mental illness, severe retardation, or autism — lived at home, on the farm, or as was stated by the noted psychologist, Dr. Bernard Rimland, an expert on autism, they were left to "wander the streets of cities and towns, defending themselves as best they could from attacks by others, scrounging food from wherever they could find it, including the gutter, trying to find shelter from cold and snow." It was to create safe and humane environments for these unfortunate people that society created special places of refuge. Some of these persons had

lived in local homes; many of these severely afflicted people had resided in the common jails, as many mentally ill persons do today. Rimland, *Community, My Foot!* Newsletter, Autism Society of Pittsburg, Vol. XVI-No. 2 (Fall, 1991).

One might conclude that advocates for deinstitutionalization have been simply uninformed of these realities. It is now apparent that the controversies and differences which exist are not based so much on misinformation, but upon different life visions. The attitude of one professional, John McKnight, is shown in a 1977 article, as follows:

> The surest indication of experience of community is the explicit knowledge of tragedy, death, and suffering. The managed, ordered, technical vision embodied in professional institutional systems leaves no space for tragedy; they are basically methods of production. Indeed, they are designed to deny the central dilemmas of life.

McKnight, *The Professional Service Business*, Social Policy 8(3) (1977). This passage was quoted in a recent book written by a director of the Pennsylvania Developmental Disabilities Planning Council. See Schwartz, *Crossing the River*, p. 165 (Brookline Books, 1992). The subject of the book is a new approach to addressing the needs of our disabled population, regardless of disability. The new vision is called "paradigm," which might be drawn from the "shifting paradigms" guru of the corporate world, a management methodology. The word is derived from ancient Greek, and it means of course "to show side by side," ergo, "model" or "pattern." The revelation in the paradigm approach is what many parents of severely impaired children have long recognized, that the alternative community systems are not working as was originally projected. The author of *Crossing the River* writes as follows:

> The new settings and the new "alternative" community system they collectively formed are now riddled with seemingly intractable problems. Task forces on finance, on abuse, on staff recruitment and retention meet urgently. Remedial actions are proposed. Yet underneath such actions lies a sense that the breakdown of our precious new settings is proceeding so rapidly that our efforts, redoubled though they might be, are insufficient and in vain.

ID., at 3. It can be seen that there is a loss of direction now, which has produced the new conception called "paradigm," to fill a void of disillusionment with the failure of the elaborate community system. Basically, the paradigm approach is to simply send the disabled children home with their parents or family, and if they cannot receive them, send them to foster care. The book contains much more, as the goal is true integration of all disabled persons into home and community, regardless of the disability. The paradigm vision is being actively promoted in some states.

How is this relevant in the present case? The decisions of the Sixth Circuit Court of Appeals, and the District Court reflect a basic misconception, that placement of persons in large residential facilities for mentally retarded persons are commitments to places of isolation and segregation; whereas, placement in community living arrangements (CLAs) represents freedom and integration. Not so say some in the avant-garde, for regulated CLAs also bring bureaucratic control, isolation, and enormous problems of appropriate care. VOR does not believe that the "big is bad" preconception, which underpins the decisions of the Sixth Circuit Court and the District Court, is accurate. The fact that the courts may never have received evidence on the real nature of the MR facilities

in Kentucky (if the record does not show it) should be no basis for the Supreme Court to accept the decisions of the lower courts that the Kentucky statutes are unconstitutional because they do not give mentally retarded adults living in the larger facilities the same procedural rights which mentally ill adults are given under Kentucky law.

C. <u>The standard of proof provided in the Kentucky statutes for commitment of mentally retarded persons, "clear and convincing," does not violate due process or equal protection standards.</u>

Placing mentally retarded persons in a residential facility should not be seen as a commitment. Commitment of mentally ill persons has by statute become very complicated. As was seen in the tortuous situation imposed upon the Horton family in Kentucky, the detailed procedure of placing a mentally retarded person in a care facility should not require all of the procedural protections for those being committed to a mental hospital, which is usually a true place of confinement. Larger facilities for the mentally retarded are places of residence, offering opportunities for habilitation and training, as are community living arrangements. In Kentucky, residential centers for retarded individuals are designated as "treatment centers," but the terms normally used for MR centers are "habilitation" and "training." Confusion of these terms has complicated judicial and legislative resolution of problems presented in this case. The burden of proof required for commitment is one of those problems.

In the case of *Addington v. Texas*, 441 U.S. 418 (1979), the issue was what standard of proof is required by the 14th Amendment in a civil proceeding under state law to commit a person involuntarily to a state mental hospital. There was a jury trial, as provided by state law. The evidence showed that the subject suffered from hallucinations and often threat-

ened to injure his parents and others. Two psychiatrists testified that he suffered from psychotic schizophrenia and that he was dangerous to himself and to others. He refused to attend out-patient programs. The trial court submitted the case to a jury on a "clear, unequivocal and convincing evidence" standard. The appellant, *Addington*, argued that the burden of proof should be "beyond a reasonable doubt." A commitment order was entered. The case was appealed, Appellant arguing that any standard of proof less than that required for criminal convictions violated procedural due process. The case was reversed by the Texas Court of Civil Appeals, and the Texas Supreme Court reversed the Court of Civil Appeals, relying upon a previous Texas state court decision, *State v. Turner*, 556 S.W.2d 563 (1977), *cert. denied*, 556 S.W.2d 563 (1977), *cert. denied*, 435 U.S. 929 (1978).

The Supreme Court explained the standard of proof required by the Due Process Clause as

> to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. *In re* Winship, 397 U.S. 358 (1970).

Addington, supra, at 329. The Court went on to discuss the three standards or levels of proof for different types of cases: preponderance of the evidence in typical civil cases between private parties, guilt of an accused beyond a reasonable doubt in criminal cases, and the intermediate standard, which is "clear and convincing" evidence. The Court noted that the "clear, unequivocal and convincing" standard of proof has been used "to protect particularly important individual interest in various civil cases." *Addington*, 441 U.S. 418, 425. The Court further stated as follows:

> In considering what standard should govern in a civil commitment proceeding, we must assess both the extent of the individual's interest in not being involuntarily confined indefinitely and the state's interest in committing the emotionally disturbed under a particular standard of proof. Moreover, we must be mindful that the function of legal process is to minimize the risk of erroneous decisions. See *Matthews v. Eldridge*, 424 U.S. 319 (1976)....

Addington, at 426. The Court held that the "clear and convincing" standard was "constitutionally adequate." *Addington*, at 433.

Addington was a mental illness case. Reasoning from the *parens patriae* power of the state to care for its citizens who are impaired by emotional disorders, the Court recognized the authority of states under their police powers "to protect the community from dangerous tendencies of some who are mentally ill." *Addington, supra*, at 427, 433. That is not the state concern for the mentally retarded. The questions are always whether the mentally retarded individual can in any degree support himself in the community and whether he or she would benefit most from residing in a larger residential facility or in a community living arrangement.

The burden of proof established by Kentucky law for MR commitments in H.B.511, §15(2), which is "clear and convincing" evidence, satisfies due process and equal protection. This intermediate standard was acceptable to the Court in *Addington* for mental commitments. It was the standard applied under Pennsylvania law by the District Court in *Clark v. Cohen, supra*, 613 F. Supp. at 698, the case which was persuasive to the District Court, (W.D. Ky.) in the present case on the due process issues. *Doe v. Austin*, 668 F. Supp. at 599-600.

II. THE SUPREME COURT SHOULD REVIEW THE DECISIONS OF THE SIXTH CIRCUIT COURT OF APPEALS IN THIS CASE AND SHOULD REVERSE BOTH 1988 AND 1992 DECISIONS.

Respondents filed a petition for writ of certiorari from the first decision of the Court of Appeals, and the Supreme Court denied the petition. *Doe v. Austin*, 848 F.2d 1386 (6th Cir. 1988), *cert. denied*, 488 U.S. 967 (1988).

A. The U.S. Supreme Court's denial of certiorari is not a favorable decision on the merits.

A denial of certiorari by the Supreme Court does not constitute an expression on the merits. *United States v. Shubert*, 348, U.S. 222, 228-229 (1955). Denial of certiorari by the Supreme Court does not ordinarily carry with it an implied approval of the ruling below. See, *e.g., United Brick and Clay Workers of America, AFL-CIO, Dist. Council No. 11 v. Gladding McBean & Co.*, 192 F. Supp. 64, 66-67 (1961). Denial of writ of certiorari by the Supreme Court should carry with it no implication whatever regarding the Court's view on the merits of the case. See *Beck v. Winters*, 407 F.2d 125, 127 (8th Cir. 1969), *cert. denied*, 395 U.S. 963 (1969).

B. The first decision of the Court of Appeals for the Sixth Circuit is not *res judicata*.

An opinion of the Court of Appeals is not *res judicata* or conclusive, where after affirmance on a second appeal, a further appeal is taken to the United States Supreme Court. *Diaz A. et al. v. Patterson*, 263 U.S. 399 (1923). The Supreme Court could have reversed the first decision of the lower court in

Diaz, and it asserted that right; but then it held that the decision was correct. *Id.*, at 402.

The Supreme Court in the exercise of its appellate jurisdiction has the power not only to correct errors of law in the judgment under review, but also to make such disposition of the case as justice requires. *Tinder v. United States*, 345 U.S. 565, 570 (1953); *State of Minnesota v. National Tea Co.*, 309 U.S. 551, 555 (1940); *Honeyman v. Hanan*, 300 U.S. 14, 25 (1937); *Patterson v. Alabama*, 294 U.S. 600, 607 (1935).

The Court therefore should review both decisions of the Sixth Circuit Court, and for the reasons stated herein, should reverse the Sixth Court decisions that the Kentucky commitment statutes for mentally retarded adults violated due process and equal protection.

III. THE KENTUCKY STATUTE WHICH PERMITS PARENTS AND LEGAL GUARDIANS OF MENTALLY RETARDED PERSONS TO PARTICIPATE IN ALL ASPECTS OF INVOLUNTARY COMMITMENT PROCEEDINGS, DOES NOT VIOLATE EQUAL PROTECTION AND DUE PROCESS.

Parents and families possess special and unique insights into the needs of their own children, regardless of age, because of their experiences and family bonds. Parents and guardians are in a better position than many experts to present the countervailing arguments (and facts) to the broad challenge of deinstitutionalization, as was shown in the experience of Tracy Horton and her family. See *Horton dep.* (R. 213).

In *Parham v. J.R.*, 442 U.S. 584 (1979), the Supreme Court deferred to the role of professionals, noting that

> the questions are essentially medical in character: whether the child is mentally or emotion-

> ally ill and whether he can benefit from the treatment that is provided by the state.

442 U.S. at 609. The Court identified another problem in requiring a formalized fact-finding hearing, which "lies in the danger it poses for significant intrusion into the parent-child relationship." Parents are presumed to act in the best interest of their children, and requiring formal hearings could "exacerbate whatever tensions already exist between the child and the parents." 442 U.S. at 610. Both of the above considerations, deference to specialists and respect for parents, are pertinent considerations in the Kentucky case before this Court.

The *Parham* case involved a minor child, mentally ill, who was committed by the state. The extensive discussion in *Parham* of the rights of parents in commitment proceedings should apply to the parent-disabled adult child relationship, where the parent has been appointed guardian. One may use as an analogy the Supreme Court's comparison of the "untrained judge or administrative hearing officer" with "the medical professional." *Parham*, at 608. The parent/guardian in most instances knows more than the courts about his or her child. Surely, parents and guardians should be involved as parties in the commitment process.

The rights of parents in these matters are well-recognized. The District Court in *Baldridge v. Clinton*, 139 F.R.D. 119, 128 (1991) stated:

> The court cannot and will not assume that parents' opinions and wishes in this case are adverse to those of their children, absent a showing to the contrary. Parents and guardians have due process interests in the decision whether their own children and wards are

> placed in a community living arrangement or in a larger residential facility.

This decision was not limited to parents of minors. In *Baldridge v. Clinton*, a class was decertified for failing to satisfy Rule 23 requirements, and the due process rights of parents were recognized, following precedent. The Supreme Court has held that the fundamental liberty interest of natural parents "in the care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). See also *Ruffalo v. Civiletti*, 702 F.2d 710, 715 (8th Cir. 1983). The Court of Appeals for the Eighth Circuit has stated: "We can conceive of no more basic bond in American society, than the tie between parent and child." *Bohn v. County of Dakota*, 772 F.2d 1433, 1435 (8th Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986). This right may be abridged only when the "demands of an organized society outweigh the parents' interest." *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982).

Parents have a keen perception of what may happen if they are no longer allowed to speak for their adult children, once a decision is made to place the child in some residential facility, large or small. Parents are sensitive to the great deinstitutionalization movement for mentally ill persons, which removed most mentally ill people from state long-term care facilities. Parents have seen the many thousands of mentally ill people now residing in the streets of America, without proper care and support. Parents have seen that many of these people now reside in other institutions, jails and prisons. Parents have seen that some mentally ill persons now reside, inappropriately, in MR facilities, because there are no other choices for them. Parents have received so many as-

surances, so many promises, which they know have been proven wrong in the effort to bring about system changes. Parents of mentally retarded children recognize that MR residential centers should be pillars of systems for developmental disabilities services. They should be the focus of activity, supporting both persons who reside there and persons in the community who need temporary or respite care and support.

The court should rule that parents and guardians may participate in all aspects of commitment proceedingss for their children. This decision would inevitably strengthen the capacities of parents and guardians to work for system improvements for those in need of safe, secure, contributory and healthy environments.

In its landmark decision, *Youngberg v. Romeo, supra*, the Supreme Court held that the courts should show a certain deference to professional judgment in the placements of disabled persons. The lower courts in the present case, by making courts the primary decision-makers in individual cases, have disavowed *Youngberg*.

CONCLUSION

For the aforesaid reasons, Voice of the Retarded (VOR) and the other amici organizations which have elected to join this brief urge that the decisions of the United States Court of Appeals for the Sixth Circuit in 1988 and 1992 be reversed.

Respectfully Submitted,

VOICE OF THE RETARDED, ET AL.

BY: _____
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NO. 92-351

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

LEONARD E. HELLER, SECRETARY,
KENTUCKY CABINET FOR HUMAN RESOURCES,

Petitioner,

V.

SAMUEL DOE, BY HIS MOTHER AND NEXT
FRIEND, MARY DOE, ET AL.

Respondents.

On Writ of Certiorari To The
United States Court of Appeals
For The Sixth Circuit

APPENDIX TO BRIEF
OF
VOICE OF THE RETARDED, ET AL,
AS AMICI CURIAE
IN SUPPORT OF PETITIONER

APPENDIX

Organizations joining VOR in this brief follow. (Organizations not members of VOR are shown with an asterisk).

ARKANSAS	Advocates for Human Development Center Residents
	Arkadelphia HDC Parents Group
	Booneville HDC Parents' Association
	Conway HDC Parents' Association
	Jonesboro HDC Parents Group
	Southeast HDC*
CALIFORNIA	Fairview Families & Friends, Inc.
	Lanterman Parents Coordinating Council and Friends
	Porterville Developmental Center Parents Group, Inc.
	California Association State Hospital Parent Council
	Green Line Parent Group, Inc. (Camarillo) Dev. Disabilities Center
	Association for Mentally Retarded at Agnews*
CONNECTICUT	Connecticut, Inc. (Friends of Retarded Citizens of)
	Southbury Training School (The Home & School Assoc. of)
FLORIDA	Haven Center, Inc.
	Spars/Parents and Relatives of Gulf Coast Residents
ILLINOIS	Beverly Farm Parent Association
	Brother James Court (Association for)
	Clearbrook Center
	Countryside Association for the Handicapped, Inc.
	Good Shepherd Manor, Inc.
	The Grove School Parent Council
	Happiday Center
	Illinois League of Advocates for the Developmentally Disabled
	The Lambs
	Lincoln Parents' Association for Retarded Citizens, Inc.
	Little Angels Parents Association
	Little City Parents Association
	The Meadows
	Waukegan Developmental Center Association for Retarded Citizens
	Dixon Association
	Jacksonville (Friends of the Developmentally Disabled)
	Ludeman Center (Parents and Friends)
	Kankakee Assoc. of Mentally Retarded (Parent Group of Shapiro Developmental Center)
	Friends of Choate*
	Fox Center Families and Friends*
	St Vincent Home for Children
	Mount St. Joseph Association
INDIANA	Parents & Friends of the Developmentally Disabled

IOWA	Citizens Advisory Board Glenwood State Hospital Parent Family Association New Hope Village Parents: Woodward State School-Hospital
KANSAS	Winfield State Hospital Parent Group
LOUISIANA	Alliance of Louisiana State School Hammond State School Parents Association Parents & Friends Club, Metropolitan Developmental Center* Northwest State School (Parents Assoc.) Family Assoc. Ruston State Developmental Center* Parents Assoc. Thibodaux State Developmental Center* Southwest Parents Assoc. Southwest Developmental Center* Pinecrest State School (Parents Assoc. of)* Parents Assoc. of Human Developmental Centers
MARYLAND	Coalition of Institutional Associations for The Mentally Retarded of Maryland Great Oaks Association, Inc. Holly Center, Inc. (Parents, Guardians and Friends of) Rosewood Center Auxiliary, Inc.
MASSACHUSETTS	Advocacy Network, Inc.* Fox Center Families & Friends* Wrentham State School* Boston Developmental Center* Hogan-Barry Parent Assoc.* Dever Assoc. for Retarded, Inc. Fernald League for Retarded Children, Inc. Massachusetts Coalition of Families and Advocates
MINNESOTA	Minnesota Chapter of Congress of Advocates for the Retarded, Inc.
MISSOURI	Missouri (Mental Retardation Association of — R.A.M., Inc.) St. Louis State School & Hospital, Inc. (Parents Assoc. of)
NEBRASKA	Beatrice State Developmental Center Mental Retardation Association of Nebraska
NEW JERSEY	North Jersey Developmental Center Parents Council
NEW MEXICO	Los Lunas Hospital & Training School Parents & Guardians Association
NEW YORK	Long Island Citizens Task Force on Aging
N. CAROLINA	Mental Retardation Assoc. of North Carolina, Inc.

OHIO	Anne Grady Center (Friends of)
	Boyd's Kinsman Home, Inc.
	Ohio League for Mentally Retarded
	Tiffin Developmental Center Parents and Volunteer Assoc.
	Broadview Parent and Friend Association
OREGON	Fairview Parents Assoc.*
PENNSYLVANIA	Altoona-Cresson-Edensburg
	PA League of Concerned Families of Retarded Citizens, Inc.
	P.I.E.R. (People Interested in Embreeville Residents)
	White Haven School (Relatives and Friends of)
	Elwyn Parent Staff Association, Elwyn, PA
TENNESSEE	TN Advocates for Developmental Center Options*
	Parent-Guardian Association of Arlington Developmental Center
	Parent-Guardian Assoc. of Cloverbottom Developmental Center
	Parent-Guardian Assoc. of Green Mountain Developmental Center*
TEXAS	Parent Association for the Retarded of Texas (P.A.R.T.), Representing 13 state schools and hospitals
UTAH	Mental Retardation Assoc. of Utah
VERMONT	Parents and Friends of Residents — Brandon Training School
VIRGINIA	Parents and Associates of The Northern Virginia Training Center-MR
WASHINGTON	Friends of Residential Centers for the Retarded
	Friends of Ranier, Inc.
	Yakima Valley School Parent Club (Friends of)
WISCONSIN	Northern Center Parents Organization
	Southern Wisconsin Center Parents Association
	St. Coletta School
	Wisconsin Parents Coalition
	Bethesda Lutheran Home

The organizations shown have consented to join in the VOR *amici curiae* brief, and they claim the same interest in this case as does VOR. They are parent and guardian groups for specific developmental centers and training schools, and in some instances, they are state-wide parent-guardian associations.